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3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA

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7 GASPER V. DRAKE,

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Plaintiff,

No. C 07-3844 PJH (PR)

9

vs.

**ORDER OF SERVICE**

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Correctional Officer J. BERG,  
Correctional Officer S. LAMPHRE,  
Correctional Lieutenant S. REPPOND,  
Warden R. HOREL, and Associate  
Warden COOK,

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Defendants.

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This is a civil rights case filed pro se by a state prisoner. The complaint was  
dismissed with leave to amend in the initial review order. Plaintiff has amended.

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**DISCUSSION**

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**A. Standard of Review**

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Federal courts must engage in a preliminary screening of cases in which prisoners  
seek redress from a governmental entity or officer or employee of a governmental entity.  
28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and  
dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may  
be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at  
1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police*  
*Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

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Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of  
the claim showing that the pleader is entitled to relief." "Specific facts are not necessary;  
the statement need only "give the defendant fair notice of what the . . . claim is and the

1 grounds upon which it rests."'" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations  
2 omitted). Although in order to state a claim a complaint "does not need detailed factual  
3 allegations, . . . a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief'  
4 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
5 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
6 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65  
7 (2007) (citations omitted). A complaint must proffer "enough facts to state a claim for relief  
8 that is plausible on its face." *Id.* at 1986-87.

9 **B. Legal Claims**

10 Plaintiff alleges that he was attacked by two prisoners. As he was defending himself  
11 from the attackers, defendant Berg, a correctional officer, shot him with "a projectile from a  
12 40mm launcher." It hit him in the left eye.

13 To succeed on a claim for excessive force that was imposed in an effort to restore  
14 order, such as plaintiff appears to be alleging here, a prisoner plaintiff must show at that the  
15 defendant acted maliciously and sadistically to cause harm. See *Hudson v. McMillian*, 503  
16 U.S. 1, 6-7 (1992). Plaintiff alleges that Berg did not give a "get down" order, nor did she  
17 attempt any less serious methods of breaking up the fight. He alleges that Berg had been  
18 trained to avoid shooting near a prisoner's face, because of the danger of serious injury or  
19 death, and if possible to "skip" the projectile off a floor or wall rather than aiming directly at  
20 a prisoner's body. This is sufficient to state a claim as to Berg.

21 Plaintiff contends that Lamphere also fired a shot, after plaintiff had been shot by  
22 Berg and had fallen to the ground. He was being kicked by his attackers when Lamphere  
23 shot him in the lower back. Again, he claims there was no warning and that the guard had  
24 been trained not to fire directly at an inmate. This is sufficient to state a claim as to  
25 Lamphere.

26 Plaintiff has not included allegations against defendants Repond, Horel, and Cook,  
27 nor listed them in the amended complaint as defendants, so they will be dismissed from the  
28 case. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992). (defendants not named

1 in an amended complaint are no longer defendants).

## 2 CONCLUSION

3 1. Plaintiff's claims against defendants Repond, Horel, and Cook are **DISMISSED**  
4 with prejudice.

5 2. The clerk shall issue summons and serve, without prepayment of fees, copies of  
6 the file, including copies of this order, upon the following defendants: Correctional Officer J.  
7 Berg and Correctional Officer S. Lamphere. Plaintiff states that these defendants can be  
8 found at Pelican Bay State Prison.

9 3. In order to expedite the resolution of this case, the court orders as follows:

10 a. Defendants shall file a motion for summary judgment or other dispositive  
11 motion within sixty days of the date this order is entered. If defendants are of the opinion  
12 that this case cannot be resolved by summary judgment, they shall so inform the court prior  
13 to the date their summary judgment motion is due.

14 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the  
15 court and served upon defendants no later than thirty days from the date the motion was  
16 served upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING,"  
17 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.  
18 1998) (en banc), and *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

19 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to  
20 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff  
21 should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION),"  
22 which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th  
23 Cir. 2003).

24 c. If Defendants wish to file a reply brief, they shall do so no later than fifteen  
25 days after service of the opposition.

26 d. The motion shall be deemed submitted as of the date the reply brief is  
27 due. No hearing will be held on the motion unless the court so orders at a later date.

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1       4. All communications by plaintiff with the court must be served on defendants, or  
2 defendants' counsel once counsel has been designated, by mailing a true copy of the  
3 document to defendants or defendants' counsel.

4       5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
5 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is  
6 required before the parties may conduct discovery.

7       6. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court  
8 informed of any change of address and must comply with the court's orders in a timely  
9 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
10 pursuant to Federal Rule of Civil Procedure 41(b).

## **IT IS SO ORDERED.**

12 | Dated: January 23, 2009.

PJH

**PHYLLIS J. HAMILTON**  
United States District Judge

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**NOTICE -- WARNING (SUMMARY JUDGMENT)**

2 If defendants move for summary judgment, they are seeking to have your case  
3 dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil  
4 Procedure will, if granted, end your case.

5 Rule 56 tells you what you must do in order to oppose a motion for summary  
6 judgment. Generally, summary judgment must be granted when there is no genuine issue  
7 of material fact--that is, if there is no real dispute about any fact that would affect the result  
8 of your case, the party who asked for summary judgment is entitled to judgment as a matter  
9 of law, which will end your case. When a party you are suing makes a motion for summary  
10 judgment that is properly supported by declarations (or other sworn testimony), you cannot  
11 simply rely on what your complaint says. Instead, you must set out specific facts in  
12 declarations, depositions, answers to interrogatories, or authenticated documents, as  
13 provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and  
14 documents and show that there is a genuine issue of material fact for trial. If you do not  
15 submit your own evidence in opposition, summary judgment, if appropriate, may be entered  
16 against you. If summary judgment is granted, your case will be dismissed and there will be  
17 no trial.

**NOTICE -- WARNING (EXHAUSTION)**

18 If defendants file an unenumerated motion to dismiss for failure to exhaust, they are  
19 seeking to have your case dismissed. If the motion is granted it will end your case.

20 You have the right to present any evidence you may have which tends to show that  
21 you did exhaust your administrative remedies. Such evidence may be in the form of  
22 declarations (statements signed under penalty of perjury) or authenticated documents, that  
23 is, documents accompanied by a declaration showing where they came from and why they  
24 are authentic, or other sworn papers, such as answers to interrogatories or depositions.

25 If defendants file a motion to dismiss and it is granted, your case will be dismissed  
26 and there will be no trial.